INDEX

CITATIONS

IN THE

Supreme Court of the United States

October Term, 1948

No. 150

J. W. KIRKLAND ET AL., *Petitioners*

v.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

On Petition For Writ of Certiorari to the United States Court of Appeals For the District of Columbia

BRIEF FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 17-18) is reported at 167 F. 2d 529. The District Court of the United States for the District of Columbia rendered no opinion in connection with its judgment, order, and decree dismissing petitioners' complaint (R. 16).

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1948 (R. 19). Petition for writ of certiorari was filed July 12, 1948. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to determine whether the district court should have taken jurisdiction to review an order of the National Mediation Board to determine an issue (respecting the proper collective bargaining unit on a railroad) which was not first presented to or acted on by the administrative agency and hence in any event is not subject to judicial review.

2. Whether, respecting the predominantly discretionary administrative certification of a collective bargaining unit under the Railway Labor Act, this Court should grant certiorari to determine whether the court below should have held that judicial review is conferred by the Administrative Procedure Act notwithstanding the provision thereof that such review does not extend to administrative action (a) which is "by law committed to agency discretion" or (b) in which "statutes preclude judicial review".

STATUTES INVOLVED

Section 2, Ninth, of the Railway Labor Act as amended by the Act of June 21, 1943, 48 Stat. 1186, 45 U. S. C. 152, provides in part:

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party

> to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. * * * In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election * * *

Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U. S. C. 1009, makes certain provisions respecting the judicial review of acts of administrative agencies

> except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *

The foregoing exceptions are contained in the introductory clause of section 10 as a limitation upon all that follows respecting judicial review. Similarly, section 10(e) of the same statute, entitled "scope of review", provides that (emphasis supplied):

> So far as *necessary to decision and when presented* the reviewing court shall decide all relevant questions of law * * * and set aside agency action * * * found to be * * * an abuse of discretion, or otherwise not in accordance with law * * * In making the foregoing determinations * * * due account shall be taken of the rule of prejudicial error.

Other provisions of the Act are involved only incidentally if at all.

STATEMENT

The complaint herein, for declaratory judgment, was brought by certain engineers of the Western Division of the Atlantic Coast Line Railroad Company (complaint ¶ 1, R. 2) against the railroad (*id.* ¶ 2, R. 2), the Brotherhood of

Engineers (*id.* ¶ 3, R. 3), the National Mediation Board (*id.* ¶ 4, R. 3), and the latter's chairman (*id.* ¶ 5, R. 3).

The pleaded facts are: The present Western Division of the Atlantic Coast Line was once a separate carrier but in 1926 Atlantic Coast Line acquired its common stock (*id.* ¶ 7, R. 3-4) and operated it as a separate entity save for certain common officers and managing personnel (*id.* ¶ 8, R. 4). However, as of January 1, 1946, the Atlantic Coast Line acquired the property and franchises outright (*id.* ¶ 9, R. 4), which it thereafter operated as its Western Division (*id.* ¶ 10, R. 4-5). The engineers of what is now the Western Division of Atlantic Coast Line had previously been a unit for collective bargaining and in 1940 the Brotherhood of Firemen and Enginemen had been certified by the Board as their representative for that purpose (*id.* ¶ 11, R. 5). That representative negotiated agreements with the employer (*id.* ¶ 12, R. 5), which included the establishment of seniority rights (*id.* ¶ 13, R. 5-6). Prior to the consolidation of the properties the Brotherhood of Engineers represented the engineers of Atlantic Coast Line as it then was (id. ¶ 14, R. 6).

From January to August 1946 there were 913 engineers on the Atlantic Coast Line, and there were 95 on its Western Division after January 1, 1946 (*id.* ¶ 15, R. 6). In April 1946 the Brotherhood of Engineers sought the action of the Board to determine the proper representative of all the engineers of the Atlantic Coast Line (*id.* ¶ 16, R. 6). It presented authorizations from a majority of the engineers other than those of the Western Division (*id.* ¶ 17, R. 6). The Board held an election among all of the engineers of the Atlantic Coast Line including the Western Division, a majority of those participating voted for the Brotherhood of Engineers as their representative, and the Board so certified (*id.* ¶ 20, R. 7-8).

Petitioners apprehended that the Brotherhood of Engineers would by new agreements with the carrier supersede

existing agreements on its Western Division and deprive engineers there of important contractual rights and concessions (*id.* ¶ 22, R. 8; ¶ 25 (3), R. 9). Hence they sought declaratory or other relief (*id.* ¶ 25, R. 9; prayer (4), R. 10). Such relief they predicated upon the Railway Labor Act, the Administrative Procedure Act, the Federal Declaratory Judgment Act, and the general equity jurisdiction of the district court (*id.* ¶ 6, R. 3).

Respondents all moved to dismiss (R. 14-15). The district court granted the motions and dismissed the complaint (R. 16). The Court of Appeals affirmed (R. 17-18).

ARGUMENT

By their complaint petitioners presented to the trial court three grounds for relief: *First*, they maintained that there was no "dispute" such as would give the National Mediation Board jurisdiction (complaint ¶ 18, R. 7; ¶ 23, R. 9). This contention was abandoned in the Court of Appeals and is not mentioned by petitioners here.[1] *Second*, the complaint alleged that the Railway Labor Act guaranteed the engineers of the Western Division the right to determine separately their own bargaining representative irrespective of what the remaining engineers of the Atlantic Coast Line might wish or do. Although not stated here as a question presented nor specified as an error to be urged (petition 6, 15), this question is pleaded, discussed

[1] In *Switchmen's Union of N. America* v. *National M. Board*, 77 U. S. App. D. C. 264, 135 F. 2d 785 (1943), the court had before it a case in which the Brotherhood of Trainmen successfully invoked the Board's services to determine whether it (rather than the Switchmen's Union) represented yardmen on the entire New York Central system. The majority of the court found it unnecessary to discuss whether this was not a sufficient "dispute", but the dissenting justice did so (p. 797). This Court mentioned the facts (320 U. S. 297 at 299). Petitioners' pleading here is carefully drawn to deny only dispute among engineers of the Atlantic Coast Line "excluding the Western Division" on the one hand or among the engineers of the Western Division on the other hand (¶ 18 and ¶ 23, R. 7 and 9), thus omitting any reference to lack of dispute between the engineers of the Western Division on the one hand and the remaining engineers of the Line on the other. It was this latter issue which the Board stepped in to settle.

in petitioners' brief, and will be treated below. *Third*, petitioners parenthetically alleged, and argue here as they did below, that the Board wrongfully interpreted the Railway Labor Act to require "carrier-wide" bargaining units in all cases under all circumstances as a mandatory matter.

The question sought to be presented by petitioners for the decision of this Court is (petition 6):

> Whether the District Court, by reason of the Administrative Procedure Act, has jurisdiction to review erroneous interpretations of the Railway Labor Act by the National Mediation Board * * *

But this Court has held that questions of reviewability should not be decided in the absence of some showing that the administrative agency has acted unlawfully. *Inland Empire Council* v. *Millis*, 325 U. S. 697, 700. The substantive question underlying the jurisdictional issue stated by petitioners is founded on their complaint here and in the Court of Appeals that (petition 5):

> The [trial] Court was asked simply to inform the [National Mediation] Board that it has the legal power and discretion, under the [Railway Labor] Act, to establish less-than-carrier-wide crafts or classes in cases where it finds that the facts warrant such action.

It is the failure of the trial court and of the Court of Appeals to consider that issue which prompts the petition for writ of certiorari (petition 4-5, 20).

It is the position of the private respondents here that the issue thus sought to be presented by petitioners is without substance, and does not call for an exercise of this Court's power of supervision, for two reasons: (1) No such issue was presented to the administrative agency and hence it may not be reviewed. (2) The question nevertheless answered by the court below, apart from its hypothetical nature, is not in conflict with any other circuit, with any decision of this Court, or with the Administrative Procedure Act and is not of importance in the circumstances.

Before discussing those matters, however, it is to be noted that petitioners' claim of the existence of a conflict between circuits (petition 10-11, 49-50) is unfounded. *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (CCA 3) involved two quite different issues. One was whether a deportation order was "ripe for review" after issuance but before the deportee was taken into custody (p. 459). The other was whether the provision of the Immigration Act to the effect that "the decision of the Attorney General shall be final" had the effect of "precluding" judicial review under the Administrative Procedure Act (p. 460-461). There are no such issues here. Moreover, there could in any event be no conflict with the present case because on July 8, 1948, the judgment in the *Trinler* case was vacated for the failure of the plaintiff to substitute the proper defendant upon a change in the office of Commissioner of Immigration.

1. **The Underlying Issue Which Petitioners Seek to Have Made Subject to Judicial Review Was Not Presented to the Administrative Agency and Consequently Is Not Reviewable.**—Petitioners' entire case revolves about the issue involved in a prior litigation on other facts between other parties in *Switchmen's Union* v. *Board*, 320 U. S. 297, 77 U. S. App. D. C. 264, 135 F. 2d 785. But administrative decisions in one case do not carry forward to control future cases on points of law or fact. *Communications Comm'n* v. *WOKO*, 329 U. S. 223, 227-228; and see *Trade Comm'n* v. *Raladam*, 316 U. S. 149, 152-153. And an administrative order does not become suspect merely because it is challenged. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602. It was essential for petitioners to make their case before the primary and exclusive administrative tribunal[2] of first and necessary resort.[3] *Unem-*

[2] The contrary is held to be "wholly inconsistent with the administrative power conferred upon the" admin'strative agency legislatively designated. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440-441. For the consistent application of the rule see *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 138 *et seq.*; *Smith* v. *Hoboken R. Co.*, 328 U. S. 123, 128-129; *Illinois Comm'n* v. *Thomson*, 318 U. S.

ployment Comm'n v. *Aragon*, 329 U. S. 143, 155. That they did not do. Consequently their issue raised in court for the first time comes too late. *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385, 387-388.

The record here shows no issue presented to, made before, or acted upon by the Board in this case. There is only a parenthetical assumption in the complaint that the Board, "proceeding upon a construction of the Railway Labor Act to the effect that all persons engaged in one type of work and employed by one carrier must be organized into one craft or class and choose one representative for collective bargaining purposes", issued an unlawful order (complaint ¶ 20, R. 7; ¶ 21, R. 8; and see prayer (1), R. 10). No decision of the Board to that effect is pleaded. None exists for the reason that no such issue was made in the administrative proceedings.[4] That petitioners

675, 686; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 404; *St. Louis, etc. Ry.* v. *Brownsville Dist.*, 304 U. S. 295, 301; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 343 *et seq.*; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 513-515; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 311.

[3] The fatal defect of failure to present the issue to the administrative agency extends to all questions. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 343, 345-346. See also *Hormel* v. *Helvering*, 312 U. S. 552, 556; *General Utilities* v. *Helvering*, 296 U. S. 200, 206; *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498; *Helvering* v. *Cement Investors*, 316 U. S. 527, 535; *Hurlburd* v. *Commissioner*, 296 U. S. 300, 306.

[4] Petitioners admit that the Brotherhood of Engineers filed its request for a determination of the bargaining representative of the railroad. Complaint ¶ 16, R. 6. The Board in the usual course thereupon held the election and made the certification. *Id.* ¶ 20, R. 7-8. That the outcome was a "foregone conclusion" (*id.* ¶ 19, R. 7) is an afterthought of petitioners, for there is no pleading and no intimation that they made any protest at that time nor that they attempted to show facts and circumstances requiring or making appropriate a less than carrier-wide bargaining representative in this particular case.

Here the administrative documents, conspicuously absent from the pleading, are few and simple. "Application for Investigation of Representation Dispute" was made on Board form April 29, 1946. After presentation of authorizations made out by engineers to the Brotherhood of Engineers, the Board issued its mimeographed "Notice of Election" dated July 6, 1946, setting out at length the terms and conditions thereof. The formal "Report of Election Results" is dated August 19, 1946. The Board's one-page certification, dated August 27, 1946, Case No. R-1662, is entitled "In the Matter of Representation of Employees of the Atlantic Coast Line Locomotive Engineers", recites the prior representation of

"promptly protested said certification to the National Mediation Board, but without avail" (complaint ¶ 20, R. 8) is immaterial in the absence of any showing, or tender of showing, of facts warranting a contrary result and in the absence of a statement of even the grounds of protest. *Marshall Field & Co.* v. *Board,* 318 U. S. 253, 255-256; *Panhandle Co.* v. *Power Comm'n,* 324 U. S. 635, 645, 649. In these circumstances the usual presumption of validity of official action governs.[5]

Nor may petitioners complain that the Board has proceeded upon a policy of certifying carrier-wide bargaining units and representatives. An administrative agency may adopt a policy within the scope of its admitted powers, leaving it to the parties in any particular case to assume the burden of showing unusual circumstances requiring a relaxation thereof in the specific case. *Republic Aviation Corp.* v. *Board,* 324 U. S. 793, 803-804. Here, as in the *Republic Aviation* case, the Board had properly stated its legitimate views.[6] Exceptions have been made to the car-

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the engineers on the Western Division and of those on the remainder of the railroad, gives the election results in figures, and certifies "that the Brotherhood of Locomotive Engineers has been duly designated and authorized to represent the craft or class of locomotive engineers employed on the Atlantic Coast Line Railroad Company, including the Western Division thereof, for the purposes of the Railway Labor Act." These are not only official records but public documents of which this Court may take judicial notice. *Underhill* v. *Hernandez,* 168 U. S. 250, 253; *Jones* v. *United States,* 137 U. S. 202, 216.

[5] *Stearns Co.* v. *United States,* 291 U. S. 54, 63; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 190; *United States* v. *Shrewsbury,* 23 Wall. 508, 517; *Butler* v. *Maples,* 9 Wall. 766, 777-778; *Wilkes* v. *Dinsman,* 7 How. 89, 130; *Philadelphia & Trenton Railroad Co.* v. *Stimpson,* 14 Pet. 448, 458-459; *Delassus* v. *United States,* 9 Pet. 117, 134.

[6] In August 1940 the Board issued "*The Railway Labor Act and the National Mediation Board*", an elaborate statement of its policies and practices. There it said: "So far as possible the Board has followed the past practice of the employees in grouping themselves for representation purposes and of the carriers in making agreements with such representatives." P. 15. "Pressure on the Board to split classes of employees hitherto considered as a unit into more and more and smaller and smaller groups, each of which is claimed to be a distinct craft, has come from all branches of employment." Pp. 15-16. "On the basis of its experience in dealing with these problems, the Board is impressed that the tendency to divide and further subdivide established and recognized crafts or classes of employees has already gone too far, and

rier-wide-bargaining-unit policy.[7] Moreover, this Court in the *Switchmen's* case plainly indicated that in the certification of bargaining units the Board had necessary authority to interpret the meaning of "craft" and its authorization of less than carrier-wide coverage would not be subject to judicial revision.[8] Hence, at least in the absence of a

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threatens to defeat the main purposes of the Railway Labor Act, namely the making and maintaining of agreements covering rates of pay, rules, and working conditions and the avoidance of labor disputes." P. 16. "Question arose when the Switchmen's Union of North America petitioned for a vote for representation of yard-service employees of the Nickle Plate Railroad at Buffalo and Cleveland, but not the rest of the yards of the carrier. The Board rejected the petition on the ground that all the yards of a carrier must vote together to choose representatives." P. 16. "The Board has ruled generally that where a subsidiary corporation reports separately to the Interstate Commerce Commission, and keeps its own pay roll and seniority rosters, it is a carrier as defined in the act, and its employees are entitled to representation separate from other carriers who may be connected with the same transportation system. If the operations of a subsidiary are jointly managed with operations of other carriers and the employees have also been merged and are subject to the direction of a single management, then the larger unit of management is taken to be the carrier rather than the individual subsidiary companies." P. 17. These statements do not indicate that the Board regards itself as irrevocably bound to any hard and fast rule. That it may issue such a statement, and that courts must take due account of it, is established not only by the *Republic Aviation* case cited in the text but by *Skidmore* v. *Swift & Co.*, 323 U. S. 134. Should the Court be in doubt it may resort to the device employed in *A. T. & T. Co.* v. *United States*, 299 U. S. 232. There the issue was whether an administrative rule would operate in an "arbitrary fashion" (p. 240). To make certain, the Court there called upon the administrative agency to file statements of its position, which the Court accepted as binding (p. 241).

[7] Bargaining representatives do not include foreign based employees of either railroads or air carriers. For a decision respecting the former, see the certification of January 28, 1946, in Case No. R-1551, *In the Matter of Representation of Employees of the Canadian Pacific Railway Co., Eastern Lines in New England, Road Conductors.* For the policy respecting air carriers, which are governed by the same statute, see the opinion of the Assistant Solicitor General to the Board's chairman dated December 13, 1946. For a Board discussion of the problem in a specific case subsequent to the *Switchmen's* litigation, see the Boards' opinion, *Determination of Craft or Class*, Case No. R-1625, *In the Matter of Representation of Employees of the Pullman Company*, dated September 30, 1946.

[8] In the *Switchmen's* case the majority in the court below held the issue to be whether the Railway Labor Act "empowered" the Board to treat an entire carrier as a unit for collective bargaining purposes. 135 F. 2d at 787. The majority ruled that it was "in the discretion of the Board whether or not to consider an organization operated and managed in the manner of the Railroad Company a single carrier for the purposes of the Act." Pp. 791, 796. The dissenting justice, similarly, was of

proper contrary showing related to the case at hand, it is to be assumed that the Board followed the law and those decisions respecting its authority. Cf. *Miguel* v. *McCarl,* 291 U. S. 442, 456.

Should any court attempt to decide the underlying issue in these circumstances, it must proceed largely in the dark as to what the Board might have done had the issue been before it. On a trial it would be improper to attempt to probe the mental processes of the Board members. Cf. *Morgan* v. *United States,* 313 U. S. 409, 422. The sole record which would be permitted is that which was before the Board. Cf. *Cox* v. *United States,* 332 U. S. 442, 453-455. But, as set forth above, that record contains nothing upon which the action of the Board may be impeached in this case. Even if this Court should desire to reconsider its opinion in the *Switchmen's* case or the application of the Administrative Procedure Act, the hypothetical issue pre-

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the view that "Congress was as far from commanding that all less than carrier-wide units be ousted as it was from concreting all units in the contract mold of 1934." P. 797. "The language of the Act places no geographic or regional requirement or limitation upon the Board's power, except that the unit must be confined to a carrier's employees." P. 800. "The Board's decision might be for a carrier-wide craft or class or for one less extensive, depending upon the case made." P. 802. His point of dissent was that the Board *in that case* "decided as a matter of law that the statute requires carrier-wide crafts as the voting unit" and therefore "failed to exercise the judgment which the statute calls into play". P. 800.

The same situation prevailed as to the dissenting justices when the case reached this Court. They felt that the Board had failed to exercise its discretion (320 U. S. at 321) because its opinion *in that case* stated that the "Act vests the Board with no discretion to split a single carrier * * * and the argument that it has such power fails to furnish any basis of law for such administrative discretion" (*id.* at 309). But the majority, although it stated that it did "not reach the merits" (*id.* at 300), held that "the authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is * * * clear and * * * essential to the performance of its duty" (*id.* at 305). Hence, whatever may be said as to the propriety of the particular disposition made of the cause in that case, the Board was plainly informed of its authority not only in the language last quoted but by the decision of the majority of this Court to the effect that its interpretations were beyond judicial review. The Board so understood. *Tenth Annual Report* (1944), p. 4.

sented here would be a poor vehicle for the purpose.[9] Cf. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 722 *et seq.*

2. The Jurisdictional Question Stated by Petitioners Was Rightly Decided by the Court Below and Presents No Matter of Substance Upon Which Review by This Court Should Be Had.—The decision below is simply that, since this Court had previously in the *Switchmen's* case held the Railway Labor Act to withhold judicial review of such an issue as was presented by the complaint in this case, such withholding was not disturbed by the subsequent adoption of the Administrative Procedure Act because section 10 of the latter exempts from its judicial review provisions matters in which "statutes preclude judicial review" or in which "agency action is by law committed to agency discretion" (R. 17-18). That brief per curiam decision does not discuss the issues or the facts. The latter leave no room for any other result under the Administrative Procedure Act or otherwise pursuant to the settled course of judicial proceedings.

Petitioners seek, by their complaint, not to have the Board exercise a discretion as to the bargaining unit but to compel the Board to certify a unit which is less than car-

[9] So far as the Administrative Procedure Act is concerned, it negatives judicial review in these circumstances. Section 10 (e) contemplates judicial review of only such issues as are "necessary to decision and when presented", and provides that account shall be taken whether the alleged error is prejudicial. Almost every section of the Act makes some provision looking to the application of law to specific cases rather than to hypothetical issues. Congress recognized that, in the specific case, "findings must in the first instance be made by the agency concerned". *Legislative History of the Administrative Procedure Act*, Senate Document No. 248, 79th Congress, pp. 217, 279. Requirements "must, to be sure, be interpreted and applied by agencies affected by them in the first instance". *Id.* 278. The second part of the introductory clause of section 10, respecting judicial review, exempts from the whole section administrative action which "is by law committed to agency discretion", although section 10(e) lists "abuse of discretion" as a reviewable issue. But there is no basis in this case upon which a reviewing court may find an abuse of discretion, for the reasons stated above.

rier wide.[10] In thus seeking a construction of the Railway Labor Act whereby less than carrier-wide units are mandatory, petitioners summarize their argument here as follows (petition 15):

> The National Mediation Board's action in placing petitioners in a carrier-wide craft or class would result in destroying a smaller collective bargaining unit which has existed for over thirty-five years, and consequently in destroying the rights of petitioners to bargain with their employer through a representative of their own choosing and to have the employer treat with that representative and with no other.

Such is the first argument in their supporting brief.[11] Petitioners thus do not seek to have the Board exercise its discretion, or to present facts which may bear thereon, but

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[10] Petitioners' basic complaint is that the initiation of the certification proceedings by the Brotherhood of Engineers was designed to deprive the engineers of the Western Division of the Atlantic Coast Line "of the right to organize and bargain collectively" separate from the remainder of the craft or class serving the carrier (complaint ¶ 19, R. 7). They ask that the Board's action be declared wholly unauthorized by the statute (*id.* ¶ 25(2), R. 9). Because, they allege, a majority of the engineers on the Western Division "have the right under sec. 2, Fourth, of the Railway Labor Act, to determine who shall be their representative for the purposes of this Act", do not desire to be represented by the Brotherhood of Engineers, and decline to accept the latter as their representative (*id.* ¶ 24, R. 9; ¶ 25(1) and (2), R. 9; ¶ 21, R. 8). In that connection the only facts pleaded are the consolidation of two carriers (complaint ¶ 9, R. 4) and the subsequent certification of a single collective bargaining agent for the resulting single railroad (*id.* ¶ 20, R. 7-8) in the place of two different bargaining agents theretofore (*id.* ¶ 11, R. 5; ¶ 14, R. 6).

[11] The subject of petitioners' first argument in their supporting brief is (petition 18): "Declaratory relief is necessary in order to protect petitioners' rights under the Railway Labor Act to select their own bargaining representative and to bargain collectively through such representative." Their argument is that (*id.* 20), "If the decision of the Mediation Board were allowed to stand, the craft or class units under the Railway Labor Act would be subject to control, not by employees as intended by Congress, but by change in ownership over which the employees have no control." Again they say (*id.* 21), "Placing petitioners in an inappropriate bargaining unit would be perhaps the most effective possible way of depriving them of their statutory right to choose their own representative and bargain collectively through such representative." Merely by virtue of the pleaded facts (*id.* 22), "Petitioners firmly believe that the Board has placed them in an inappropriate bargaining unit and thereby deprived them of the many valuable rights outlined briefly above, including their right to choose their own representative and to bargain with their employer. Petitioners further believe that the Court has full power to grant the relief here sought."

seek instead the exact contrary.[12] This Court has held that the measure of an appropriate bargaining unit is a matter which "involves of necessity a large amount of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." *Packard Co.* v. *Labor Board,* 330 U. S. 485, 491. The Administrative Procedure Act does not intervene to confer judicial review in that situation but, on the contrary, expressly exempts from judicial review administrative action which is "by law committed to agency discretion" (section 10, introductory clause). Consequently the Act confirms and requires, in the present case at least, that the complaint should be dismissed. The district court rightly did so, the Court of Appeals correctly affirmed, and no possible occasion is presented for review by this Court. That such is the proper result in matters of discretion notwithstanding the Administrative Procedure Act has, indeed, lately been stated by this Court. *Ludeke* v. *Watkins,* No. 723, decided June 21, 1948.

Petitioners argue at great length that the present situation does not fall within that provision of section 10 of the Administrative Procedure Act which excludes from judicial review matters in which "statutes preclude judicial review" (petition 6-10, 23-53). But, since the issue here is one of discretion which the Administrative Procedure Act in any event exempts from judicial review, it is unnecessary to explore whether the present case is not also exempt from judicial review under that Act by virtue of its further exclusion of matters in which "statutes preclude review" (section 10, introductory clause). In short, since one clause

[12] It is true that petitioners mention the very different question of the Board's alleged failure to exercise its admitted discretion (petition 5, also quoted in the text *supra*), erroneously state that respondents have contended for mandatory carrier-wide units in this court proceeding (*id.* 18), and maintain in their supporting brief that "the failure of the Board to exercise [its] discretion necessitates the declaratory relief here sought by petitioners" (id. 20). These are attempts to bring this case within *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194 *et seq.*, for alleged failure of an administrative agency to exercise discretion conferred upon it. However, the pleaded issue (see note 10 *supra*) and the burden of petitioners' argument here (see note 11 *supra*) are otherwise.

of the Administrative Procedure Act preserves administrative finality in the situation here presented it is unnecessary to determine whether the Act does not also do the same under another clause. Certainly there is no reason why this Court should grant certiorari, in the circumstances of this case, for the determination of that purely academic question.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

August 11, 1948

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